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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 344

Continental Distilling Corporation,
Petitioner,

vs.

The Connecticut Importing Company,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 129 F. 2d . It is found in the record at page 519. Rehearing was denied without written opinion on August 5, 1942.

II.

The reasons urged by the petitioner for issuance of the writ are without merit and present no novel question of widespread interest.

The principal contention of the petitioner is that the writ should be allowed inasmuch as the construction and interpretation of the Miller Tydings and Fair Trade Acts,

present a novel and important question which should be settled by this Court, and that the District Court and United States Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings and the decisions of this Court, as to call for the exercise of this Court's power of supervision.

The respondent contends that the petitioner in its brief fails to disclose either that the questions raised are of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari or that the decision of the United States Circuit Court of Appeals is in conflict with decisions of other Courts. As pointed out in the decision of the Circuit Court of Appeals in this case, neither the Miller Tydings Act nor the Connecticut Fair Trade Act have any application to the case at bar, because neither act legalizes a conspiracy to violate the Sherman Act. All of the other questions presented by the petitioner have either been answered in previous cases or that they present questions of fact only.

III.

Statement of the Case.

Because the petitioner in its brief fails to state sufficient facts fully and accurately to inform the Court of the basic facts of the litigation, it becomes necessary for the respondent to give a summary of the facts.

This is a civil action under the Sherman Anti-trust Act. The violations of the act consisted of a conspiracy between the defendant, Continental Distilling Corporation, (hereafter referred to as Continental), and the other defendants named in the complaint, as well as Austin Nichols and McKesson & Robbins, who were distributors,

to control wholesale and retail prices on the liquor products sold by Continental through its Connecticut distributors, and to boycott and blacklist all retailers and distributors, including the plaintiff who would not maintain the prices agreed upon. The elements of the conspiracy were that Continental appointed the plaintiff as the distributor of its products for the State of Connecticut in August, 1936 under a continuing agreement to supply it with its products; that the plaintiff relying upon the agreement employed additional salesmen and marketed substantial amounts of the products of Continental, the respondent at the time of its appointment was acting as a distributor of a number of nationally advertised liquors and had built up a substantial business throughout the State of Connecticut.

From the date of the plaintiff's appointment as a distributor until November 1, 1936, Continental limited its price maintenance policy to the issue of lists containing suggested re-sale prices from distributors to retailers and from retailers to the public. Although the plaintiff in its sales to retailers employed a percentage of mark-up less than that included in the suggested re-sale prices, Continental made no complaint to the plaintiff.

The conspiracy alleged in the complaint commenced in November of 1936. Its essential elements consisted of an agreement among the defendants and McKesson and Robbins to maintain re-sale prices from distributors to retailers and from retailers to the trade, the enforcement of the agreement by a system of espionage, blacklisting and intimidation, and the termination of the plaintiff's distributorship by the concerted action of the defendants and McKesson and Robbins because of the plaintiff's refusal to maintain the prescribed re-sale prices, and the sale by the plaintiff of Continental products to retailers on the blacklist.

The method used by Continental to enforce price maintenance was in general as follows:

Continental, through agents employed by it and designated as "missionary men", canvassed the retail stores for the purpose of ascertaining the prices at which they were selling Continental products and ascertaining the distributors from whom these products were purchased. Upon the ascertainment of the fact that a retailer was selling at prices below the prescribed resale price, the retailer was advised by Continental to desist from such practice. In the event of failure to desist, the retailer was reported to Continental's Sales Manager (R., p. 140).

Retailers who failed to conform to prescribed resale prices were placed on lists of undesirable customers, known as "blacklists", which were filed with the distributors, with instructions that sales of Continental products should not be made to the retailers thus "blacklisted" (R., pp. 148, 169).

Another means of enforcement was by buying out the stock of retailers who did not adhere to prescribed resale prices (R., p. 142).

Another means employed was to "smoke out" a retail store not adhering to prescribed prices, that is to employ a large group of men who would come into a store to purchase Continental products and who would at the same time fill the store with cigar smoke (R., pp. 156, 157).

Newspapers carrying advertisements of retailers who refused to conform to prescribed resale prices were threatened with the discontinuance of the national advertising of Continental if they continued to carry the advertisements of such retailers (R., pp. 171, 172).

To check the distributors selling to retailers who did not maintain resale prices, agents of Continental examined the serial numbers of the cases in retail stores, from which

the distributors selling Continental products to such stores could be determined (R., p. 144).

Continental's sales manager complained to the plaintiff's president that the other Connecticut distributors were complaining that the plaintiff was not maintaining prices (R., p. 60). He further stated that all of the other Connecticut distributors agreed to and did adhere to the Continental's policy of enforcing price maintenance and cooperated with Continental in its enforcement (R., pp. 58, 60, 335, 358, 427, 429, Plaintiff's Exhibits A, B, C, & D).

On the 7th day of January, 1937, Continental's sales manager called at the plaintiff's place of business and advised the plaintiff's president that Continental had held a meeting with all the distributors and it was decided at the meeting that the plaintiff would be cut off as a distributor of Continental products, because the plaintiff failed to adhere to the price maintenance policy of Continental and its distributors, and thereupon the plaintiff was discontinued as a distributor (R., p. 64). The plaintiff's president immediately communicated with the vice-president and general sales manager of Continental and as a result of this conversation, Continental called a meeting of all its distributors, to be held at the Taft Hotel in New Haven. At this meeting representatives of all the defendants were present. The plaintiff's president and secretary were invited by Continental's sales manager to attend the meeting. One of the defendants (Sherman) made a motion that the plaintiff's president and secretary leave the room so that the distributors and Continental could discuss and decide among themselves whether the plaintiff should be allowed to continue as a competitor distributor of Continental products. The plaintiff's president and secretary left the room and remained in the corridor of the hotel for an extended period of time when the door of the meeting room opened and

plaintiff's president and secretary were invited into the room and thereupon were informed by Continental's Sales Manager that "it was decided here that you gentlemen are to be definitely discontinued as our distributors" (R., p. 76). The following day Continental's Sales Manager called at plaintiff's place of business and requested the plaintiff to return all of Continental's merchandise, which it then had on hand, but the plaintiff refused to do so and continued to sell the same to the trade. The plaintiff has ever since been unable to secure Continental's products.

The damages claimed were the profits reasonably anticipated between the date of the termination of plaintiff's distributorship and the date of commencement of action.

The trial was by jury, and plaintiff recovered a general verdict against all defendants in the sum of $16,000, which was trebled by the Court. On appeal by petitioner and Sherman Mfg. Co., Inc. the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment. The petitioner is the only defendant applying to this Court for a writ of certiorari.

IV.

Argument.

Petitioner's reasons why certiorari should be granted in this case may be briefly summarized as follows:

(a) The constructions and interpretation to be accorded to the Miller Tydings and the State Fair Trade Acts, presents a novel, important question of Federal Law which should be settled by this Court.

(b) The Circuit Court of Appeals erred in holding that the evidence before the jury was competent and sufficient to establish a conspiracy under the Sherman Act.

(c) The Circuit Court of Appeals erred in sustaining the trial court in its refusal to instruct the jury on petitioner's right of customer selection.

(d) The Circuit Court of Appeals erred in holding that a conspiracy under the Sherman Act, once established, may be found to continue indefinitely even though there be no proof that it has been kept alive during the intervening period.

V.

Each of these reasons will be hereafter discussed in its order.

A.

The Miller Tydings Act and the Connecticut Fair Trade Act have no application to the case at bar, and therefore no important question of federal law is presented for review by this Court.

The plaintiff's cause of action was based entirely upon a conspiracy between the defendant, Continental, defendant distributors and other distributors. None of the actions forming the elements of this conspiracy would be permitted either under the Connecticut Fair Trade Act or the Miller Tydings Act.

Plaintiff was removed as a distributor of Continental products on January 8, 1937 as a result of an agreement and combination between the defendants to exclude plaintiff as a distributor because of its failure to adhere to the price maintenance policy of Continental and its distributors. Thereafter and effective as of July 1, 1937, the State of Connecticut had enacted a State Fair Trade Act (Secs. 573d, 1937 Conn. Cum. Supp.). On

August 17, 1937, the Miller Tydings Act (Amending Sec. 1 of the Sherman Act) was passed (15 U. S. C. 1).

The Miller Tydings Act and the State Fair Trade Act did not relieve the acts of the defendants from illegality. On the contrary, *these Acts specifically provided that in spite of the exemptions permitting an agreement between a buyer and seller to fix prices it would still be unlawful for distributors of commodities to conspire together to fix prices.* This proviso was to the effect that the preceding exemption of contracts, prescribing minimum prices for resale, from the incidence of the Sherman Act did not make lawful any agreement

> "for the establishment or maintenance of minimum resale prices * * * between manufacturers, or between producers or between wholesalers * * * or between retailers, or between persons, firms or corporations in competition with each other."

In other words the violation of law would not be in the agreement of Continental to fix resale prices, but in the combination of the distributors with one another and with Continental to affect this result.

The petitioner on page 11 of its brief refers to provisions of Sec. 1 of the Sherman Act and states

> *"the amendment further provides that nothing in it shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, brokers with brokers, factors with factors, or retailers with retailers. It is to be noted that the author of the act was of the opinion this proviso was unnecessary and that the amendment did not validate horizontal price maintenance agreements."* (Italics ours.)

Since the petitioner admits in its petition that the Miller Tydings Act did not validate "horizontal" price maintenance agreements, and the entire record discloses that the claim and proof by the plaintiff was based upon a "horizontal agreement" between the defendants, there appears to be no reason for this Court to construe or interpret the Miller Tydings and Fair Trade Acts.

> "The Fair Trade Act was adopted to legalize 'vertical price fixing' between a manufacturer, a distributor, or a retailer, and hence price maintenance contracts which are the result of agreements between manufacturers or producers and which amount to 'horizontal price fixings', are not valid under the Fair Trade Act or the Sherman Anti-trust Act, as amended and are not enforceable."
>
> *Frank Fischer Merchandising Corporation* v. *Ritz Drug Co.* (1941), 19 A. 2d 454, 129 N. J. Eq. 105.

"Horizontal" price fixing agreements have been condemned by this Court by settled and repeated decisions.

Federal Trade Commission v. *Beech-Nut*, 257 U. S. 441, 452, 453;

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 224 note 59;

Ethyl Gasoline Corporation v. *United States*, 309 U. S. 436, 438;

United States v. *Trenton Potteries Company*, 273 U. S. 392, 397;

Such an agreement is illegal irrespective of the reasonableness of the prices. It necessarily restricts freedom of competition and is contrary to the policy of the Sherman Act. The Circuit Court of Appeals for the Second Circuit recently upheld a judgment awarding damages to the present plaintiff against different defendants under similar

facts. *Connecticut Importing Company* v. *Frankfort Distilleries*, 101 F. (2d) 79. The present situation is not one where Continental indicated that it would not sell to plaintiff if the latter did not observe its price schedules, but one where there was proof of an agreement among the defendants, and other distributors to maintain the schedules, and of a conspiracy on their part to exclude plaintiff as a distributor because it did not adhere to the price maintenance policy of Continental and its distributors. Accordingly, the doctrine announced in *United States* v. *Colgate & Co.*, 250 U. S. 300, upon which petitioner relies, does not apply.

In the *Colgate* case there was no such combination or agreement or any averment of any combination or agreement. The Court said, page 305:

> "There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

This Court in *Ethyl Gasoline Corp.* v. *United States* (decided March 26, 1940), 309 U. S. 436, 84 L. ed. 852, had occasion recently to pass on an action involving a violation of the Sherman Anti-trust Act and re-affirmed its previous decisions and said, on page 457:

> "The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price cutters. *Cf. United States* v. *Colgate & Co.*, 250 U. S. *United States* v. *A. Schrader's Son*, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251. A very different scene is depicted by the record. It is one in which appellant has established the marketing of the patented fuel in

vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contracts resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them. It seems plain that this attempted regulation of prices and market practices of the jobbers with respect to the fuel purchased, for which appellant could not lawfully contract, cannot be lawfully achieved by entering into contracts or combinations through the manipulation of which the same results are reached by the exercise of the power which they give to control the action of the purchasers. Such contracts or combinations which are used to obstruct the free and natural flow in the channels of interstate commerce or trade even in a patented article, after it is sold by the patentee or his licensee, are a violation of the Sherman Act. *Federal Trade Commission* v. *Beech-Nut Packing Co. supra* (257 U. S. 453, 66 L. ed. 313, 24 S. Ct. 150, 19 A. L. R. 882); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 66 L. ed. 708, 42 S. Ct. 363, *supra; Victor Talking Mach. Co.* v. *Kemeny* (C. C. A. 2d), 271 F. 810, 817; *cf. United States* v. *A. Schrader's Son*, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251 *supra.*"

Similarly a different scene is depicted from the record in the case at bar than is pictured by the petitioners. In the present case there was an abundance of evidence of the practices condemned in *Federal Trade Commission* v. *Beech-Nut Co., supra,* where the Court said, page 453:

"The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of

interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company, either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as 'Undesirable-Price Cutters' to whom goods are not to be sold, and who are only to be reinstated as one whose record is 'clear', and to whom sales may be made, upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices."

B.

The Circuit Court of Appeals did not err in holding that the evidence before the jury was competent and sufficient to establish a conspiracy under the Sherman Act.

That the question whether there was sufficient evidence before the jury to establish a conspiracy under the Sherman Act was one of fact for the jury. This question was passed upon by both the District Court and the Circuit Court of Appeals. Surely this question is not of sufficient gravity or general importance to justify any review by this Court.

The conspiracy was clearly established as appears by the facts which were well stated in the decision of the Circuit Court of Appeals in this case (R., pp. 520, 521, 522, 523, 524.)

Without going into detail concerning the evidence offered by the plaintiff to establish a conspiracy, suffice it to say there was proof offered that Continental and its distributors agreed together to control and fix prices, and that in order to carry out and enforce the same, employed so called "missionary men" to canvass retail stores and to advise such stores as were found to be selling Continental products below the list prices to desist, and, if they did not desist, to report them to the distributors, blacklist them and prevent them from buying any more goods (R., pp. 148, 169). Other means Continental adopted to penalize retailers who refused to conform to the price schedule were to "smoke out" retail stores (R., pp. 156, 157) and to buy out their stocks of Continental goods (R., p. 142) and to induce newspapers not to carry their advertising (R., p. 172). The letters in which each promised to adhere to the price schedule of Continental (R., pp. 427, 428, 429), asserted inability of Continental to reinstate plaintiff without the consent of the other distributors, and the meeting of January 19, 1937, at which the reinstatement of plaintiff was refused (R., p. 76), it is a reasonable inference that:

(1) The defendants agreed in November, 1936 after the plaintiff had been appointed as a distributor, to maintain uniform prices in disposing of Continental products.

(2) When plaintiff did not conform to this price maintenance agreement, its competitors Libbey, Sherman, McKesson & Robbins and Austin Nichols insisted on removing the plaintiff as a distributor (to whom in fact they had objected from the beginning), and refused to allow it to be reinstated, and

(3) The defendants entered into a conspiracy to violate the Sherman Act which resulted in the loss of the plaintiff of its position as a distributor of Continental and

deprived it of its profits that it would have realized had it been allowed to continue its former status. As briefly pointed out the facts in the case at bar are similar to those in the *Beech-Nut* case, *supra,* which have been held to violate the Sherman Act. Mr. Justice Day speaking for the Court in the *Beech-Nut* case said (pp. 452-53):

> "We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. *The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices,* which, in the *Colgate* case, was held to be within the legal right of the producers."

After stating the facts the Court goes on further to say:

> "From this course of conduct a Court may infer, indeed, cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products and constrained to sell at the suggested prices."

C.

The trial Court did instruct the jury on petitioner's right of customer selection.

Here again the petitioner raises a question with regard to the instructions given by the Court to the jury. This claim is not of sufficient gravity or general importance to justify the Court in granting a writ of certiorari.

The Court did charge the jury on petitioner's right of customer selection (R., p. 411) as follows:

> "* * * for I think the issue is right there, whether

there was this concerted agreement, or whether the defendant, The Continental Company, was acting independently in the exercise of its own discretion in determining with whom it would deal. As has been stated here, it was and is the Continental's privilege to decide with whom it will deal and to refuse to deal with persons with whom it chooses not to recognize. And as long as it is acting in its independent discretion to do so, it is entitled to take this action."

The trial court is not required to adopt and use the language of a request to charge; it is enough if the instructions upon the point involved are correct and adequate.

Braithwaite v. *Lee*, 125 Conn. 10, 15, 2 Atl. (2) 380;

Pickens v. *Miller*, 119 Conn. 553, 555, 177 Atl. 573.

The right of Continental to prescribe resale prices as an independent action was not an issue in the case. The evidence offered by the plaintiff was directed against enforcement of arbitrarily fixed prices by *concerted action of Continental and the defendant distributors, and the termination, by defendants' concerted action, of plaintiff's distributorship becasue of its refusal to conform to such prices.*

D.

The Circuit Court of Appeals did not hold as claimed by petitioner that a conspiracy under the Sherman Act, once established, may be found to continue indefinitely even though there be no proof that it has been kept alive during the intervening period.

Again the petitioner urges a claim which appears to be of no general importance to justify the granting of any review by this Court.

The Circuit Court of Appeals in the case at bar did not hold as petitioner contends, but on the contrary, said (R., p. 525):

> "The wrong the plaintiff suffered occurred when it was excluded as a distributor. Any continuance of the conspiracy beyond that period could have no affect on its right to damages after Continental had once terminated its agency with the joint action with the other defendants."

There was competent evidence of the continuation of the conspiracy after the wrongful termination of plaintiff's distributorship in the circumstances under which the termination was effected, indicating in itself the finality of the decision of the conspirators in Continental's refusal to ship the plaintiff's order of January 5, 1937, in the demand that plaintiff surrender its stock of merchandise on hand, and in the continued inability of the plaintiff to buy Continental's products. Any further demand upon the part of the plaintiff would have been futile. It is difficult to comprehend what overt act there could have been in the circumstances of the case. The object of the conspiracy was the termination of the plaintiff's privilege to purchase Continental products and distribute them in competition with other distributors to the retail trade. The conspiracy having been successfully completed there would be no occasion for any further act upon the part of the conspirators, since the plaintiff had already been damaged as a result of the concerted action on the part of the conspirators.

Moreover, the rule as to the evidence required to prove the continuation of the conspiracy would differ in no respect from the rule as to the evidence to initially prove the conspiracy namely, that the conspiracy need not be shown

by direct evidence, but from such facts and circumstances in evidence as legitimately tend to sustain the inference of conspiracy. *United States* v. *Manton,* 107 Fed. (2) 834-839.

On page 29 of its petition, the petitioner claims that there is a conflict between the decision of the Circuit Court of Appeals in the case at bar and in the opinion of that Court in *Connecticut Importing Co.* v. *Frankfort Distilleries Inc.,* 101 F. (2) 79.

The facts in these cases were almost identical. However, on the question of damages, the plaintiff, in the *Frankfort* case claimed damages from the date it was wrongfully discontinued as a distributor to the date of trial. The trial court ruled that the plaintiff could not recover damages beyond the date of suit. The Circuit Court of Appeals in sustaining this ruling stated, page 81:

> "The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc.* v. *Cudahy Packing Co.,* 243 F. 205."

The petitioner's quotation of the Court's opinion in the *Frankfort* case, while incomplete, refers to the discussion in the opinion, of the reason why damages could not be recovered beyond the date of suit, the Court saying, page 81:

> "Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was

brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

In the case at bar, no claim was made by the plaintiff for damages subsequent to the date of the commencement of action, and as the Court said, page 81,

> "no testimony was offered of damages computed beyond estimated profits which might have been realized up to the date of suit."

Since the claims for damages differ in these respective cases, there is no conflict between the decisions.

In the instructions of the trial judge to the jury on the determination of damages, the jury was charged that the damages recoverable should be limited to the profits which could have been anticipated by the plaintiff for a period of the probable expectancy of the continuation of the distributorship, not longer than the interval between the date of the termination of the distributorship and the date of commencement of action. The anticipated profits were proved by a report of the Special Master appointed by the trial court. Continental filed no exceptions to that report, which was offered in evidence by the plaintiff. The damages awarded by the jury were less than the profits which could have been reasonably anticipated on the basis of the report of the Special Master.

The question of whether the plaintiff can recover damages by the institution of another action was not before either the District Court or the Circuit Court of Appeals and surely will not be considered by this Court. To ask this Court to take jurisdiction for the purpose of

passing upon a question which is not involved in this case and completely outside of the record would be asking it to render an advisory opinion.

Conclusion.

There is no conflict between the decision of the Circuit Court of Appeals in the present case and any decision rendered by this Court, nor is the decision in conflict with the decision of the Circuit Court of Appeals of any other Circuit. There is not even a reasonable basis for a claim of error in any conclusion reached by the Circuit Court of Appeals.

It is therefore respectfully submitted that this is not a case for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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